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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1406

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Petitioners,

versus

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, members of the Adams County Board of Supervisors,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE PEACH TAYLOR
FRANK R. PARKER

Lawyers' Committee for
Civil Rights Under Law
233 North Farish Street
Jackson, Mississippi 39201

Attorneys for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	19
I. THE DECISION BELOW CONFLICTS WITH GOMILLION v. LIGHTFOOT, 364 U.S. 339 (1960), AND THE OTHER APPLICABLE DECISIONS OF THIS AND OTHER COURTS REGARDING THE CHARACTERISTICS OF UNCONSTITUTIONAL RACIAL GERRYMANDERING.	22
II. THE DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT REGARDING THE BURDEN OF PROOF IN CASES SHOWING RACIAL AND VOTING DEPRIVATIONS.	27
III. THE COURT OF APPEALS MISCONSTRUED WHITCOMB v. CHAVIS, 403 U.S. 124 (1971) AND WRIGHT v. ROCKEFELLER, 376 U.S. 52 (1964), IN CONSIDERING THEM DETERMINATIVE OF THIS CASE.	31
CONCLUSION	33

TABLE OF AUTHORITIES

Cases	Page
Anderson v. *Martin*, 375 U.S. 399 (1964)	28
Burns v. *Richardson*, 384 U.S. 73 (1966)	22
Bussie v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D.La. 1971), modified, ____ F.2d ____ (5th Cir. 1971), petition for cert. filed sub nom. *Taylor* v. *McKeithen*, 40 U.S.L.W. 3356 (U.S. Dec. 13, 1971) (No. 71-784)	23
Dunn v. Blumstein, 40 U.S.L.W. 4269 (U.S. Mar. 21, 1972) (No. 70-13)	29
Drum v. *Seawell*, 250 F. Supp. 922 (M.D. N.C. 1966) (three-judge court)	23
Fairley v. *Patterson*, decided sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969)	20, 21
Fortson v. *Dorsey*, 379 U.S. 433 (1965)	22
Gomillion v. *Lightfoot*, 364 U.S. 339 (1960)	22, 23, 25, 26, 31
Harper v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966)	29
Hunter v. *Erickson*, 393 U.S. 385 (1969)	28
Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969)	7
Kramer v. *Union Free School District*, 395 U.S. 621 (1969)	29
Loving v. *Virginia*, 388 U.S. 1 (1967)	28

TABLE OF AUTHORITIES (Continued)

Page

Marsaw v. *Patterson*, Civil No. 1201, S.D. Miss., consolidated with *Fairley* v. *Patterson*, 282 F. Supp. 164 (S.D. Miss. 1967), rev'd sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969) 6

McLaughlin v. *Florida*, 379 U.S. 184 (1964) 28, 29

Perkins v. *Matthews*, 400 U.S. 379 (1971) 20

Reynolds v. *Sims*, 377 U.S. 533 (1964) 23, 29

Sellers v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966) (three-judge court) 24

Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court) 23, 24, 26

Sincock v. *Gately*, 262 F. Supp. 739 (D.Del. 1967) (three-judge court) 12, 24

Smith v. *Paris*, 386 F.2d 979 (5th Cir. 1967), affirming 257 F. Supp. 901 (M.D.Ala. 1966) 24

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) .. 22

United States v. *Mississippi*, 380 U.S. 128 (1965) 19

Whitcomb v. *Chavis*, 403 U.S. 124 (1971) 3, 31, 32

Wright v. *Rockefeller*, 376 U.S. 52 (1964) 3, 23, 31, 32

Other Authorities

28 U.S.C. § 1254(1) 2

42 U.S.C.

§ 1971 7

§ 1971 (a) (1) 4

TABLE OF AUTHORITIES (Continued)

Page

§ 1973 ..... 4, 7

§ 1983 7

Miss. Code § 2870 (1956 Recomp.) 5, 20, 30

A. deGrazia, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (Praeger: New York, 1962) 12

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1971

No.

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

Petitioners,

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ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, members of the Adams County Board of Supervisors,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 6, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 453 F.2d 455, the

opinion of the United States District Court for the Southern District of Mississippi is unreported, and both opinions are reproduced in the Appendix attached to this Petition.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 6, 1972, and subsequently a timely petition for rehearing or, alternatively, for rehearing *en banc* was filed. The petition for rehearing was denied, and after a poll of the court at the request of one of the judges, the petition for rehearing *en banc* likewise was denied on February 25, 1972. This petition for certiorari is being filed within ninety days of the denial of the petition for rehearing *en banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners are challenging a redistricting plan which restructures the boundaries of the five county supervisors' districts of Adams County, Mississippi (47.9 percent black) to insure that no more than one of the five districts contains a black population majority, substantially diminishes the voting strength of blacks in that one district, and cancels out the voting strength of blacks dispersed throughout the other four districts. The questions thus presented are:

1. Whether manipulation of election district boundaries on the basis of race by abandoning pre-existing

district lines and crossing neighborhood boundaries to disperse a heavily black population concentration (here, old District Four) among four new election districts and thereby maximizing the number of white majority districts and minimizing the number of black majority districts constitutes unconstitutional and unlawful racial gerrymandering.

2. Whether the burden of proof should have been shifted to the defendants to show that the new boundary lines not merely were rational or logical, but that they were necessary to redistricting and that no less burdensome alternatives were available.

3. Whether the court of appeals erred in holding that *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), governed the outcome in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Fifteenth Amendment:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1971(a)(1):

> (a) (1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

42 U.S.C. § 1973:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

STATEMENT OF THE CASE

In Mississippi each county is governed by a five-man board of supervisors which exercises executive, legislative, and quasi-judicial powers (such as jury selection) and whose members are elected from five supervisors' districts required to be equal in population by state law. Miss. Code § 2870 (1956 Recomp.). The court of appeals' decision sustains as nondiscriminatory a racial gerrymander of the boundaries of the five supervisors' districts of Adams County, Mississippi — a county which is 47.9 percent black — which insured that no more than one black representative (if indeed it is possible to elect one) can be elected to the county's five-man governing board of supervisors, or to other offices elected on a district basis, justice of the peace and constable.

The petitioners (hereinafter designated plaintiffs) are two black Adams County voters, one a candidate for the board of supervisors in the 1971 general election, who were displaced by the defendants' November 2, 1970 redistricting plan from District Four, the only majority black district in the county, and placed in new majority white districts where, because of bloc voting along racial lines in the county (Tr. 16-17),[1] they and those similarly situated are unable to elect any blacks or to be elected to public office.[2] The re-

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[1]The abbreviation "Tr." refers to pages in the Trial Transcript.

[2]Subsequent to the redistricting plaintiff Leon Howard moved his legal residence back into new District Four to run, unsuccessfully, as an independent candidate for the District Four seat on the board of supervisors.

spondents (hereinafter designated defendants) are the Adams County Board of Supervisors and its members who are charged under Mississippi law with the duty of establishing equi-populous supervisors' districts and who adopted the challenged redistricting plan.

1. This case is another step in the continuing efforts by Adams County officials to inhibit the constitutional rights of the plaintiff class to free and equal political participation. Prior to the passage of the Voting Rights Act of 1965, few black citizens of Adams County were permitted to register and vote (App. 11a).[3] Subsequent to the enactment of the Voting Rights Act, when black voters had gained a majority in Supervisor's District Four, the Adams County Board of Supervisors abolished election of its members on a district basis and in 1967 all five supervisors were chosen on an at-large basis, with all the county voters voting for all the candidates, thus returning to office another all-white board (Pre-Trial Stipulation, ¶¶ 12, 15). The switch to at-large supervisors elections subsequently was enjoined for failure of the defendants to obtain clearance under Section 5 of the Voting Rights Act of 1965[4] and when clearance was sought the Attorney General objected to the change as racially discriminatory (Complaint, Ex. D).

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[3]The abbreviation "App." refers to pages in the Appendix filed with this Petition.

[4]*Marsaw* v. *Patterson*, Civil No. 1201, S.D. Miss., consolidated with *Fairly* v. *Patterson*, 282 F. Supp. 164 (S.D. Miss. 1967), rev'd sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), temporary injunction issued, April 23, 1969.

Having failed in their effort to dilute black voting strength by contriving at-large elections, the defendants contracted with a Mississippi planning agency, Comprehensive Planners, Inc. (CPI), to redistrict the county and on November 2, 1970 adopted a new plan redistricting the county's five supervisors' districts. After an examination of the characteristics and effects of the plan, the plaintiffs on May 5, 1971, filed this class action challenging the redistricting plan on the grounds, inter alia, that it was racially discriminatory in violation of the rights of black voters and candidates for office secured by the Fourteenth And Fifteenth Amendments to the United States Constitution and implementing Federal statutes, 42 U.S.C. §§ 1971, 1973 and 1983.[5]

2. The evidence shows that prior to the redistricting, the population and racial composition of the Adams County supervisors' districts was as follows (1970 Census figures):

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[5]Other counts in the complaint involved the failure of the United States Attorney General to make a specific finding that the redistricting plan was nondiscriminatory when it was submitted to him pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (Count I), and the malapportionment of the supervisors' districts which resulted from the redistricting (Count III), the latter of which was sustained by the District Court. According to the statistics provided by the defendants, as judged by 1970 Census data, the November 2, 1970 redistricting plan resulted in new districts ranging from 10.12 percent under-represented to 12.03 percent over-represented, a span of 22.15 percentage points, a malapportionment clearly unconstitutional under the standards set out in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

Old District	*White*		*Black*		*Total*
1	9,305	(68.5%)	4,265	(31.4%)	13,590
2	668	(62.3%)	403	(37.6%)	1,073
3	1,040	(69.7%)	448	(30.0%)	1,492
4	3,695	(24.5%)	11,356	(75.3%)	15,074
5	4,658	(76.8%)	1,393	(23.0%)	6,064
	19,366	(51.9%)	17,865	(47.9%)	37,293

Black majority District Four, with 15,074 persons, was twice the population norm of a correctly apportioned district (7,459). The most logical and economical plan (which would have done the least violence to pre-existing district boundaries) would have been to split old District Four into two new districts (which would have had black majorities) and to combine other districts to establish new districts with the following results:

Old District	*Population 1970 Census*	*Population New Dist.*	*Pop. Under or Over Norm*	*Percent Variance*	*Percent Black*
4	15,074	7,537 (two new districts)	+ 78	+ 1.05%	75.3%
1	13,590	7,332 (two new districts)	—127	— 1.70%	31.8%
2	1,073				
	14,663				
3	1,492	7,556 (one new district)	+ 97	+ 1.30%	24.4%
5	6,064				
	7,556				

Instead of relying upon pre-existing boundaries which would have provided an adequate basis for a new redistricting plan, the defendants completely abandoned pre-existing district lines in favor of a plan which dispersed the black population of old District Four among four new districts.

3. Under the challenged plan, the population of black majority District Four was split four ways. The less politically active rural area, together with some territory from adjacent District Five, became new District Four with a substantially diminished black population percentage. The urban area of old District Four, containing the most politically active black voters, was divided up among three of the new white majority districts. The result was that the percentage of blacks in new District Four was substantially decreased, and the more than 6,700 black persons who were excluded from new District Four had their votes cancelled out by being dispersed throughout white majority districts where they would be out-voted by white bloc voting in every election:

New District	*White*	*Non-White*	*Total*
1	3,586 (54.6%)	2,976 (45.4%)	6,562
2	4,466 (60.2%)	2,955 (39.8%)	7,421
3	4,183 (50.9%)	4,031 (49.1%)	8,214
4	2,288 (33.2%)	4,602 (66.8%)	6,890
5	4,843 (59.0%)	3,363 (41.0%)	8,206
	19,366 (51.9%)	17,927 (48.1%)	37,293

(Trial Ex. P-12)

This population dispersal had a clearly discriminatory effect on black voting strength in the new districts. In each district in Adams County the number of black registered voters as a percentage of the black population invariably is disproportionately lower than the number of white registered voters as a percentage of the white population (Pre-Trial Stipulation, Ex. H). Thus, although new District Three is almost half white and half black by population, there can be no doubt that the district has a white registered majority. Even more significantly, the black registered majority of District Four, which prior to the redistricting was 62.8 percent of the total number of registered voters in that district (id.), was reduced by the redistricting to an estimated 50 percent of the total in new District Four (Tr. 91). Thus, while the defendants had the opportunity to redistrict the county to provide black registered majorities in two of the five districts, with the attendant possibility of electing blacks to the board of supervisors and other district positions, under the redistricting plan which they adopted none of the five districts contained a black registered majority, with the possible exception of new District Four in which a clear-cut black registered majority of 62.8 percent was all but eliminated.

This is the classic case of maximizing the number of districts returning safe majorities for whites and minimizing the number of districts returning safe majorities for blacks by dispersing the black majorities

as much as possible and gathering together white voters to create new white majorities.[6]

Instead of utilizing 1970 Census data (available in published form in early 1971), Comprehensive Planners at the same time the 1970 Decennial Census was being taken (April 1, 1970) counted the occupied houses in Adams County and multiplied occupied houses by a housing occupancy factor (average number of persons per occupied housing unit) to locate persons in Adams County and to arrive at a "population estimate" as a basis for redistricting. Far from being "colorblind" (App. 32a), the defendants and their planning agents were exceedingly race-conscious in designating all occupied houses on a house count map according to the race of the occupants — white homes marked in red and black homes in green (Pre-Trial Stipulation, Exhibits F and G) — with racial designations supplied by the defendants or their employees (Tr. 202-07, 304-14 and passim). The housing occupancy factors used as multipliers also were differentiated according to race, although it was conceded that the racial statistics for housing occupancy used (1960 Census data) were not an accurate method of estimating 1970 population (Tr. 205-06) and the use of this technique resulted in malapportioned supervisors' districts.

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[6]See A. de Grazia, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (Praeger: New York, 1962), quoted with approval in *Sincock* v. *Gately*, 262 F. Supp. 739, 829 (D.Del. 1967) (three-judge court).

4. The locations and shapes of the boundaries of the new districts indicate an intentional manipulation of district lines to disperse black voters. Prior to the redistricting, only two of the five districts penetrated the corporate limits of the City of Natchez, where blacks constitute a majority of the city population and where most of the black voters in the county live (see Figure 1).

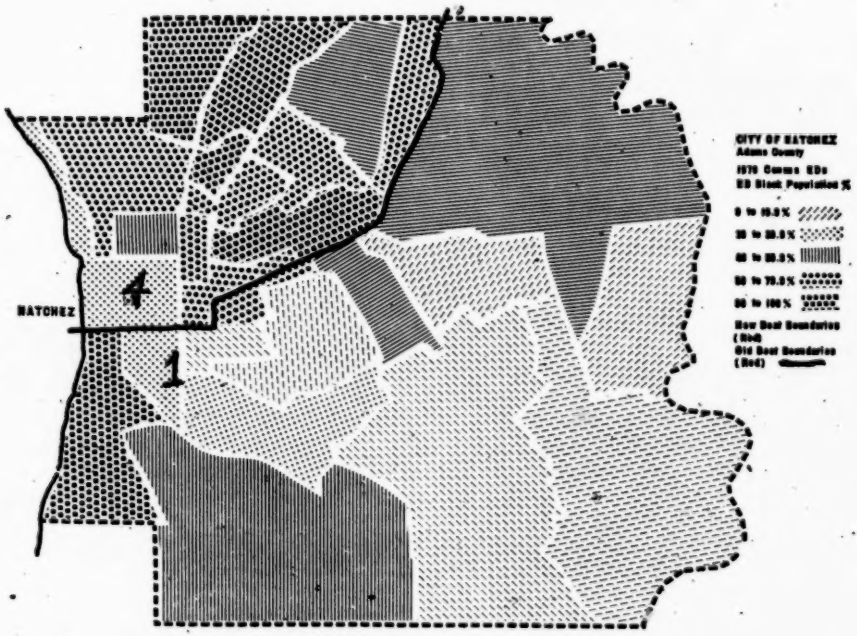


Figure 1. Map showing the boundaries of supervisors' districts (beats) within the City of Natchez prior to redistricting, superimposed on 1970 Census enumeration districts shaded for racial percentage.

As a goal of the new redistricting plan, the population concentration in Natchez (majority black) was consciously and intentionally "split up ... between the districts" (Tr. 214-15). The new district lines, rather than following neighborhood patterns, cut across neighborhood lines to disperse the black population formerly contained in District Four among four of the five new districts (see Figure 2).

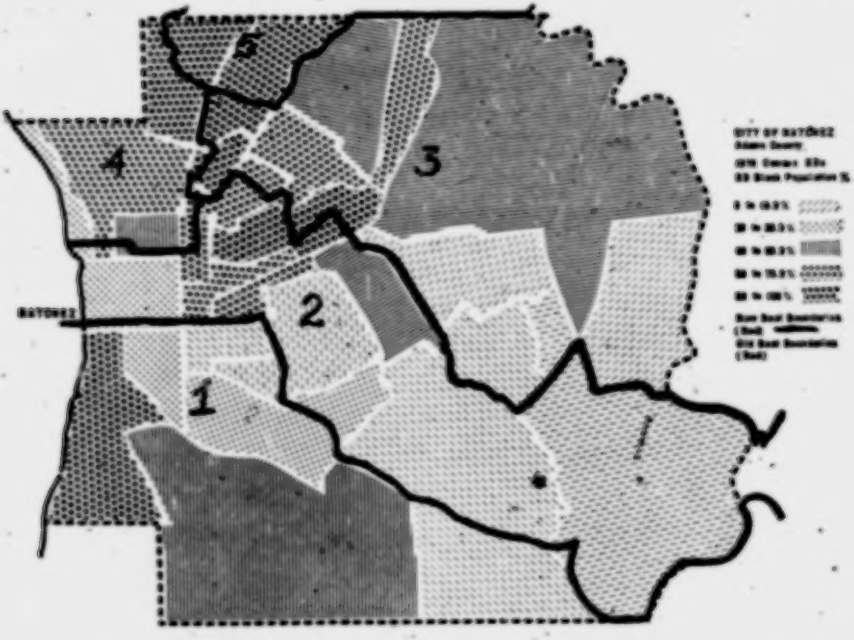


Figure 2. Map showing the boundaries of supervisors' districts (beats) within the City of Natchez as established by the challenged November 2, 1970 redistricting plan, superimposed on 1970 Census enumeration districts shaded for racial percentage.

5. Each of the new district lines spread out from Natchez like spokes from the center of a wheel, combining black population concentrations in Natchez with white population concentrations in the county, sacrificing any semblance of compactness or contiguity (see Figure 3).



Figure 3. Outline map of the boundaries of the supervisors' districts in the city and the county established by the challenged November 2, 1970 redistricting plan, showing the distorted boundaries lacking compactness and contiguity, including the "giraffe" shape of District 2 (county and city) and the "turtle's head" shape in District 5 (city map).

New District Two is a giraffe-shaped district with more than 70 sides, nearly 50 of which are found within the City of Natchez, takes three pages to describe, and zig-zags a tortuous path from the Mississippi River on the north across the county to the Wilkinson County boundary on the south. Similarly, new District Five spans the county in zig-zag fashion from the Franklin County boundary on the east to the Steirs Lane area, where that portion which gobbles up portions of the black population of old District Four resembles a turtle's head. It was admitted by defendants' own planner that the district shapes in the City of Natchez were not compact or contiguous (Tr. 273) and defendants failed to establish any non-racial justification for the shape or location of those lines.

6. The uncontradicted and largely admitted facts show that the redistricting has a disastrous effect on the voting strength and political power of black voters in Adams County. Those residential areas in the city and county containing the most politically active black citizens were displaced from District Four and removed to white majority districts. The only black officials to be elected to office in Adams County in this century, the District Four justice of the peace and constable elected in 1967, and all the officers and members of the board of the NAACP county branch (the county's only civil rights organization) were displaced from District Four and settled in new white majority districts. On the other hand, the planners consciously and intentionally as a goal of the redistricting plan drew the boundaries so that none of the incumbent white supervisors, illegally elected as part of the at-

large election scheme in 1967, were displaced from the districts they were elected to represent. As a result, another all-white board of supervisors was returned to office in the elections of 1971.

Both plaintiffs testified without contradiction that black candidates could not win office in any of the new districts, except in new District Four as a remote possibility (Tr. 50-51, 90), and plaintiffs' expert witness testified that the redistricting plan was, in his opinion, a racial gerrymander diluting and minimizing black voting strength (Tr. 150). Finally, there is nothing necessary or "inevitable" (App. 63a) about the shape or location of the new district lines; the defendants' planning expert himself testified that there were "a number of ways that lines can be drawn in any given county situation" (Tr. 284).

The district court found that the defendants' redistricting plan on the undisputed 1970 Census figures resulted in districts malapportioned by a span of 22.15 percentage points variance from the norm and ordered them to submit a new plan by December 1, 1971 providing for equally apportioned districts, but held that "plaintiffs have failed upon the facts and the law to establish any gerrymandering to dilute the black voting strength in District 4 or any other district of Adams County" (App. 29a). The district court refused to enjoin the use of the challenged redistricting plan in the 1971 primary and general elections (App. 50a), and the Fifth Circuit concurred but in an interlocutory order required new elections for supervisor positions af-

ter district court approval of a constitutional redistricting plan in 1972 (App. 53a).

On plaintiffs' claim of racial discrimination, the court of appeals, without discussion of the elements of proof of plaintiffs' case, recognized that the black voters formerly residing in District Four were disadvantaged by being placed in new districts with white majorities (App. 63a), but declined to hold either that the redistricting constituted a racial gerrymander or that the proof thrust on the defendants the burden of showing that the new lines were required by a compelling state interest and that no less burdensome alternatives were available.

Although a new election for supervisor positions is required by the Fifth Circuit's Order of July 29, 1971, this case is not moot, and plaintiffs seek review of the decision of the court of appeals for the following reasons. Since both the district court and the court of appeals refused to enjoin the use of the challenged plan in the 1971 elections, the defendants' November 2, 1970 redistricting plan established the boundaries of Adams County supervisors' districts for the election of county supervisors, justices of the peace, and constables in that major election year. Both the district court and the court of appeals denied plaintiffs' prayers in their complaint for a declaratory judgment that the November 2, 1970 redistricting plan was racially discriminatory (which would have the effect of barring its use as the basis for future plans) (Complaint, ¶ 22 (a)) and for an injunction against the defendants barring future racial gerrymandering (id. at ¶ 22(b)). If this Court should review and reverse the decision

of the court of appeals, plaintiffs would be entitled to this future relief. Further, because of malapportionment, the interlocutory order requires new elections only for county supervisors, but not for other county officials elected in 1971 on the basis of the gerrymandered districts, specifically, justices of the peace and constables. If the district court and court of appeals erred in holding that the districts used as the basis for the 1971 elections were not gerrymandered, plaintiffs would press their claim in this Court for new justice of the peace and constable elections as well.

REASONS FOR GRANTING THE WRIT

This case represents a continuation and further stage of what this Court early identified in *United States* v. *Mississippi*, 380 U. S. 128, 135 (1965) as the "long-standing, carefully prepared, and faithfully observed" effort in Mississippi to bar black voters from the effective use of the franchise. Although as a direct result of the Voting Rights Act of 1965, black voter registration in the state has increased from 28,500 (pre-1965) to an estimated 268,000 (28 percent of the total), only seven black county supervisors (of a total of 410) in six counties (out of 82) have been successful in gaining elective office.

This exclusion of blacks from county governing boards in Mississippi cannot be attributed to accidental or adventitious circumstances. Shortly after the passage of the Voting Rights Act of 1965 the Mississippi Legislature enacted legislation, ostensibly for the purpose of meeting one man, one vote requirements, to

allow county boards of supervisors to switch from a district system of electing members to at-large voting, with all the voters of the county voting for all the members of the board. A number of Mississippi counties, including Adams, took advantage of this opportunity to dilute the voting strength of blacks who had attained a registered majority in particular supervisors' districts (in Adams, District Four) but who were in the minority county-wide. In *Fairley* v. *Patterson*, No. 25, O.T. 1968, decided sub nom. *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), this Court noted the potential for dilution of black voting strength inherent in this new device in requiring that it be submitted to the United States Attorney General for his approval pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Upon submission of the 1966 Amendment to Miss. Code § 2870 the Attorney General entered an objection on the ground that this new law had the purpose and effect of denying and abridging the right to vote on account of race (Complaint, Ex. D).

At-large elections having been eliminated as a device for diluting black voting strength, racial gerrymandering of district lines now appears as one of the greatest current threats to free exercise of the franchise by black voters in Mississippi. Last term in *Perkins* v. *Matthews*, 400 U.S. 379, 389 (1971), this Court noted the findings of the United States Commission on Civil Rights that since the passage of the Voting Rights Act "gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters" in the South. There appears to be a growing move-

ment in Mississippi on the part of all-white boards of supervisors to use their constitutional obligation to establish equally apportioned districts as a cover to gerrymander district lines and disperse concentrations of black voting strength, thus assuring all-white county governments in most parts of the state.[7]

The essential issue presented in this case is whether this Court's decision in *Fairley* and the Attorney General's subsequent objection are to remain effective barriers to unconstitutional dilutions of black voting strength, or whether those decisions may be undermined by the use of the new technique of racial gerrymandering which, by combining black majorities with greater white majorities through manipulation of district boundaries, minimizes or wipes out the gains achieved in the prior litigation.

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[7]In 1971 the United States Attorney General, through his delegated agent the Assistant Attorney General in charge of the Civil Rights Division, entered objections pursuant to Section 5 of the Voting Rights Act to county redistricting plans submitted by seven Mississippi counties on grounds that it was impossible to determine whether the new redistricting plan diluted black voting strength or that study revealed that the submitted plan made the effect of diluting black voting strength without compelling justification. Significantly, redistricting plans in four of these counties were devised by Comprehensive Planners, Inc., of West Point, Mississippi, the planning agent of the defendants in the case at bar.

I. The Decision Below Conflicts With Gomillion v. Lightfoot, 364 U.S. 339 (1960), And The Other Applicable Decisions Of This And Other Courts Regarding The Characteristics Of Unconstitutional Racial Gerrymandering.

Prior to its decisions in the reapportionment cases, this Court held in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), that a complaint alleging that the boundaries of a municipality had been altered from a regular geometrical shape to an "uncouth twenty-eight-sided figure" excluding most of the black voters from majority black Tuskegee, Alabama, stated a cause of action for violation of rights secured by the Fourteenth and Fifteenth Amendments. *Gomillion* thus stands for the proposition that racial gerrymandering — the manipulation of election district boundaries for the purpose or effect of diluting black voting strength — violates Federal constitutional and statutory voting guarantees. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 311 (1966). *Gomillion* and the dicta of the subsequent reapportionment cases indicate that to establish unconstitutional racial gerrymandering, it is not necessary to produce direct evidence of evil motives or racial motivation: apportionment schemes are unconstitutional when they "designedly or otherwise ... operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966).

The court of appeals appears to have been in general

agreement with the plaintiffs on these fundamental legal principles, but failed properly to apply the principles of the racial gerrymandering decisions to the facts of this case. This Court and other courts have identified the following characteristics — the symptoms of the disease — as indicating prohibited racial gerrymandering:

1. History of prior racial discrimination in voting. *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M.D.Ala. 1965) (three-judge court).

2. Departing from historic and previously established boundary lines. *Gomillion* v. *Lightfoot*, supra; *Sims* v. *Baggett*, supra, 247 F. Supp. at 109.

3. Dispersing concentrations of black voters throughout several districts with the effect of diluting black voting strength. *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452, 457 (E.D. La. 1971), modified, ____ F.2d ____ (5th Cir. 1971), petition for cert. filed sub nom. *Taylor* v. *McKeithen*, 40 U.S.L.W. 3356 (U.S. Dec. 13, 1971) (No. 71-784).

4. Lack of geographic compactness and contiguity in the new districts. *Gomillion* v. *Lightfoot*, supra; *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964); *Drum* v. *Seawell*, 250 F. Supp. 922, 925 (M.D. N.C. 1966); cf. *Wright* v. *Rockefeller*, 376 U.S. 52, 59-74

(dissenting opinions of Douglas and Goldberg, JJ.).

5. Combining territories with compact black majorities with territories containing white majorities and thus converting black voting majorities into white voting majorities. *Sims* v. *Baggett*, supra, 247 F. Supp. at 109; *Smith* v. *Paris*, 386 F.2d 979 (5th Cir. 1967), affirming 257 F. Supp. 901 (M.D. Ala. 1966); cf. *Sincock* v. *Gately*, 262 F. Supp. 739, 829 (D.Del. 1967) (three-judge court).

6. Perpetuating whites in office, while at the same time excluding blacks from the opportunity of being elected. Cf. *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966) (three-judge court).

This listing is not exhaustive, but merely identifies the principal characteristics of racial gerrymandering. Some of these elements taken alone, or several in combination have been held sufficient in the cited cases to show a violation of Equal Protection Clause and Fifteenth Amendment guarantees.

The critical significance of this case is that on the admitted and undisputed facts set out in the Statement of the Case, ALL of the above-stated characteristics of unconstitutional racial gerrymandering are present.

Given the distribution of population in Adams County, it is doubtful that the defendants could have achieved a more devastating dispersal of black voting strength to minimize the voting power of the black residents remaining in District Four and to cancel out the voting power of those excluded from District Four. Plaintiffs Howard and Schoby, and the class they represent, (like the plaintiffs in *Gomillion,* supra) were by this dispersal of the black population denied the right to vote in the one district in which their vote could be effective — the district in which they constituted a majority prior to redistricting — and where they could run for office with some possibility of success and elect black candidates if they so chose. The court of appeals failed to discuss or justify any of these characteristics of racial gerrymandering, established by the undisputed facts, in its decision. Rather, the court of appeals rested its decision on what it considered was a failure of proof.

First, the court of appeals held that the record was "bare" of any evidence showing that the redistricting plan was the product of a racial motivation or purpose (App. 61a), and thus appears to hold that such prohibited racial motivation must be shown by some direct evidence of improper motive or racial bias on the part of the defendants. After years of civil rights litigation, those who are bent on denying constitutional rights have learned to be quiet about it, and thus to require direct evidence of improper purpose is not only impossible in most cases, but is not even necessary, as the cases cited by the court of appeals and noted above have established. Proof of an "inescapable ef-

fect of discriminating against Negroes" in voting has been held sufficient to show prohibited racial motivation, since the defendant public officials knowing what they have done must have intended the natural and inescapable effects of their actions. *Gomillion* v. *Lightfoot*, supra; *Sims* v. *Baggett*, supra, 247 F. Supp. at 109-110.

Second, the court of appeals rejected plaintiffs' contention that the redistricting plan was unconstitutional by relying on the fact that blacks retained a majority in new District Four (although substantially diminished) and that they had swelled in population in the other districts. This analysis is defective because it uses as the basis of comparison the unconstitutional circumstances prior to redistricting. Although blacks previously had a majority in only one district, District Four, their population was sufficiently large that, in the language of the reapportionment cases, District Four voters were "constitutionally entitled" to two supervisors, not one. The redistricting plan, which dispersed this second black majority among three new white majority districts, thus robbed those black voters of the opportunity to elect a second black supervisor which they would have had if the redistricting had been accomplished on a fair and non-racial basis — by dividing old District Four in half, providing for two black majority districts.

As to racially balancing the other districts, achieving a racial balance may be a significant remedy against discrimination where schools or juries are involved, but providing racial balance among election

districts in a black minority county where racial bloc voting prevails has the disastrous and inherently discriminatory effect of cancelling out the voting strength of the black minority with the overwhelming white vote.

This is not to say that under any circumstances black voters in a 48 percent black county are constitutionally entitled to two black majority districts. What we are saying is that prior to the redistricting, according to the district boundaries that obtained then, plaintiffs and the plaintiff class resided in a majority black district large enough to elect two supervisors, that this pre-existing circumstance may be taken as a non-racial standard against which the challenged redistricting may be judged. The fact that the defendants did not consider or adopt a redistricting plan which recognized this pre-existing level of black voting strength, but rather adopted a plan which dispersed the black population concentration formerly included within old District Four among three new white majority districts, thus diminishing the effectiveness of their votes, shows purposeful racial discrimination and a constitutionally impermissible dilution of black voting strength.

II. The Decision Below Conflicts With The Applicable Decisions Of This Court Regarding The Burden Of Proof In Cases Showing Racial And Voting Deprivations.

The court of appeals in judging the facts failed to apply the proper constitutional standard because, hav-

ing determined that black voters in Adams County were disadvantaged by being "shifted ... to districts in which they may no longer be in the clear majority," (App. 63a), it failed to hold that the burden of proof was shifted to the defendants to establish a compelling justification for the new district lines. Shifting the burden of proof to the defendants was required first, because the evidence established a prima facie case that defendants had employed a racial classification in redistricting, dispersing the black population of old District Four and using express racial designations in computing population figures (red for white homes and green for black homes); second, because the redistricting plan disproportionately burdened the effectiveness of the voting strength of the county's black population, thus infringing the exercise of a fundamental constitutional right; and third, because the redistricting came on the heels of an immediate prior history of discrimination in voting, thus making the new electoral mechanism which diluted black voting strength presumptively unconstitutional.

The decision of the court of appeals directly conflicts with the numerous decisions of this Court holding that both racial classifications and electoral mechanisms which abridge the effectiveness of the franchise — particularly the voting rights of racial minorities protected by the Fourteenth and Fifteenth Amendments — are "constitutionally suspect" and "bear a far heavier burden of justification than other classifications." *Hunter* v. *Erickson*, 393 U.S. 385 (1969), *Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), *Anderson* v. *Martin*, 375 U.S. 399 (1964)

(racial classifications); *Dunn* v. *Blumstein*, 40 U.S.L.W. 4269 (U.S Mar. 21, 1972) (No. 70-13), *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966), *Reynolds* v. *Sims*, supra, 377 U.S. at 561-62 (voting deprivations).

Under this "strict scrutiny" standard, which the court of appeals should have applied, the defendants should have been required to show that the boundaries of their redistricting plan were (1) necessary, (2) were required by a compelling state interest, and not merely "logically" drawn (as the district court erroneously held (App. 22a)) or rationally related to redistricting, and (3) that there were no available alternatives which could have accomplished redistricting without the attendant dilution of black voting strength. See *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), *McLaughlin* v. *Florida*, supra.

If the court of appeals had placed the burden of justification on the defendants, it is unlikely that the redistricting scheme could have been sustained, particularly in light of the testimony of defendants' expert witness that "there are a number of ways that lines can be drawn in any given county situation" (Tr. 284) to achieve districts of equal population and in light of the possibility that equi-populous districts could have been obtained merely by subdividing District Four without diluting black voting strength.

The court of appeals also failed to give any weight to the admitted proof that none of the defendants' stated goals of their redistricting had been achieved

by the challenged plan. The defendants have claimed throughout that the new boundaries were justified to achieve equality in population, road mileage, and area of each of the new districts (App. 57a). However, the new districts resulted in inequalities in population ranging from 10.12 percent under-represented to 12.03 percent over-represented (a span of 22.15 percentage points) (App. 20a), disparities of road mileage from 59.0 miles to 74.7 miles (Plan, p. 6), and disparities of area from 45 square miles to 152 square miles (a disparity of 107 square miles, 9 square miles greater than the disparity under the pre-existing districts) (id.).[7] The fact that the redistricting did not achieve even its stated goals[8] is both probative of racial motivation and evidence that the challenged redistricting fails to withstand the required "strict scrutiny."

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[7]Supervisors' districts are not required to be equal in road mileage or area either by state law, Miss Code § 2870 (1956 Recomp.) or the Constitution. These criteria were injected because of the traditional district unit system of county management in which each supervisor is responsible for maintaining county roads and bridges within his own district, a system which has been condemned as wasteful and inefficient by the General Legislative Investigating Committee of the 1972 Mississippi Legislature.

[8]Only the unstated goal, that of retaining each incumbent supervisor in his respective district (Tr. 271) was achieved, and that goal is inherently discriminatory under the circumstances of this case.

III. The Court Of Appeals Misconstrued Whitcomb v. Chavis, 403 U.S. 124 (1971) And Wright v. Rockefeller, 376 U.S. 52 (1964) In Considering Them Determinative Of This Case.

In holding that the challenged redistricting plan did not unconstitutionally dilute the voting strength of the complaining minority, the court of appeals relied heavily upon this Court's decisions in *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), and *Whitcomb* v. *Chqvis*, 403 U.S. 124 (1971), neither of which is directly applicable to, or determinative of, this case. In *Wright* this Court held that the plaintiffs had failed to show that a Congressional redistricting scheme which established a heavily black and minority group district adjacent to several majority white districts had the purpose or effect of racial discrimination. In this case the opposite was accomplished — rather than concentrate minority voting strength, the defendants here dispersed black voting strength to achieve a dilution of black votes more closely resembling the *Gomillion* gerrymander and which Mr. Justice Black writing for the majority in *Wright* suggested would be vulnerable to constitutional attack (376 U.S. at 58).

Last term in *Whitcomb* the Court refused to strike down an Indiana legislative apportionment scheme providing for multi-member districts because of its adventitious effects upon ghetto voting strength. Contrary to the claims of the plaintiffs here, the plaintiffs in *Whitcomb* conceded that there was no legislative purpose to dilute black political effectiveness.

Neither *Wright* nor *Whitcomb* involved proof of a history of exclusion of blacks from the free exercise of voting rights, the use of racial designations to accomplish redistricting, disparate treatment of white and black office-holders, or the specific question of dilution of black voting strength achieved by the dispersal of the black voting population among several election districts by manipulation of district boundaries. Thus, the court of appeals' reliance on those decisions presents an urgent case for granting the petition for certiorari because this case presents important questions relating to the deprivation of voting rights which were not settled by the Court in those cases and which should be resolved.

* * * * *

The decision of the court of appeals bodes ill for the future of black political participation in Southern states because it accepts as "inevitable" redistricting which unnecessarily disperses black voters throughout white majority districts, thus robbing them of the opportunity to elect black representatives if they so chose. The court below, by deciding the case summarily and without oral argument, turned a deaf ear to the political realities of the situation. If the decision of the court of appeals is allowed to stand, the newly enfranchised black voters of Adams County, Mississippi, will find themselves once again without an effective voice in the political process, for it is axiomatic in American politics that submerging an identifiable interest group — particularly a constitutionally protected minority — so that it is denied the opportunity

to elect representatives in proportion to its voting strength is as harmful to the group's members as not permitting them to vote at all.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GEORGE PEACH TAYLOR
FRANK R. PARKER
Lawyers' Committee for Civil Rights Under Law
233 North Farish Street
Jackson, Mississippi 39201
Attorneys for Petitioners

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